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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 297

DIXILYN DRILLING CORPORATION,
Petitioner,

versus

CRESCENT TOWING & SALVAGE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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This brief is being filed in opposition to the application for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

The Statement of Fact presented in the application is substantially correct as far as it goes, but a description of the drilling rig JULIE ANN is necessary for the Court properly to understand the nature of the obligation undertaken for the movement of the rig. For this purpose, we respectfully refer Your Honors to its description contained in the opinion of the Court of Appeals below, found in the Appendix to the Petition herein at Pages 36 and 37.

Your Honors will note that this rig is obviously an unusual, bulky and unmaneuverable object. At the time the towage was being performed, the rig had not yet

been completed and was being moved down the Mississippi to New Orleans from the builder's yard at Vicksburg. At New Orleans, additional work was to be performed on the rig. Accordingly, the accident which is the subject of this litigation occurred when there were on board a substantial number of shipyard employees as well as a full crew of the owner's representatives, who were operating the legs in order that sufficient clearance could be obtained by the rig when it passed under any bridges. Crescent had nothing whatever to do with the operation of the legs.

The District Court found that Crescent was negligent in the performance of the towage. Although the Court of Appeals did not reach that point, it did indicate that if it had to decide the factual issue, it would probably reverse, or at least be confronted "with an extremely difficult decision."[1] However that may be, the questions presented by the petition for certiorari make no reference to the factual situation, and obviously any present discussion of the facts is beyond the scope of the application or this opposition.

The application for the writ presumes that an exception to the rule of *Bisso*[2] must be carved in order that the decree below be permitted to stand. *Bisso*, however, involved a situation where a dumb barge was towed on a routine voyage, whereas in the instant case a full crew and a number of shipyard workers were on board the rig for the purpose, among others, of operating its legs. Two of the fact issues in the case were whether or not the mechanism for raising and lowering the legs of the rig was in good operating condition and whether or not the mechanism was being properly operated by Dixilyn's employ-

[1] Opinion of Court of Appeals, Appendix to Petition for certiorari, p. 35.

[2] *Bisso v. Inland Waterways Corporation*, 349 U.S. 85, 75 S. Ct. 629.

ees. Crescent charged that the accident occurred because the Dixilyn employees misread the draft marks on the legs and failed to lower them sufficiently to clear under the bridge, this being the primary and proximate cause of the accident rather than any negligence in the navigation of the tug.

Moreover, a choice of rates had been offered to Dixilyn, based on whether or not a release clause was to be included in the towage contract, coupled with an agreement to afford Crescent the benefit of Dixilyn's insurance. It is to be borne in mind that Crescent was charging only $35.00 an hour for its tug and that it was undertaking to tow a craft worth several million dollars. A trip insurance policy on the rig would have cost approximately 1% of its value, and upon being offered the choice of rates, the owner of the JULIE ANN voluntarily chose the cheaper rate where Crescent would not be required to insure and where risks of loss were to be borne by it (and its own underwriters). It is submitted, therefore, that this case is completely different from *Bisso*, and that the Court of Appeals was correct in concluding that "the *Bisso* rule is not applicable to prevent Dixilyn from indemnifying Crescent against third party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance."[3]

Assuming, however, that the towage situation here was substantially the same as that involved in *Bisso*, it is submitted that the "Questions Presented" in the petition for certiorari must be answered adversely to the contentions of the petitioner. The first question presented is whether or not an exception should be made to the

[3] Opinion below, *supra*, footnote 1, pp. 49, 54.

"rule" that public policy precludes the inclusion of a release clause in a towage agreement. This, of course, is the only question which could properly be classified as being potentially within the review jurisdiction of this Court. We submit that the question, if properly posed by this record, should be answered in the affirmative and merits no review.

Two reasons for the announcement of the "rule" of *Bisso* formed the basis of the opinion of the four-justice majority in that case. These reasons were, first, to discourage negligence by making wrong-doers pay damages, and, second, to protect owners from being overreached by towers having the economic power or a monopolistic position enabling them to drive hard bargains or overreach the other party to the towage contract. Mr. Justice Douglas specially concurred with the four-justice majority on the theory that an economic brief or a record which would be more definite in the latter area should be presented to him before he would be inclined to take the other side. The record in this case is complete and affirmative on both scores. It was shown beyond peradventure in the District Court that "Crescent was in no position to overreach Dixilyn or to drive a hard bargain."[4] The record also shows that there were a number of towers, competitors of Crescent, who were in a position to undertake this isolated towage movement of a new drilling rig from the builder's yard, and Dixilyn was wholly free, from the economic point of view, to negotiate with any one of a number of Crescent's competitors who were available to furnish the services required.

Moreover, there is in this case no reason for an application of the rule of *Bisso*. This was not, as in *Bisso*,

[4] Opinion below, *supra*, footnote 1, p. 53.

an ordinary movement of a small dumb barge such as is encountered daily by the thousands on the inland waterways system of this country. This was a movement of an unwieldly, unmaneuverable monster, and could almost be said to be unique in that very few triangular shaped, 2500 ton displacement floating drilling rigs with "legs" projecting 175 feet into the air are towed in the Mississippi upriver from New Orleans. The very size, shape and lack of maneuverability present a perfect example of why it is necessary for a tower to seek a release of liability insofar as its towage contracts are concerned.

It was for this reason, we submit, that the rule of *Southwestern Sugar*[5] was fashioned. That rule is cited in the petition herein (p. 10) and relied upon by the Court of Appeals in the italicized portion of its opinion.[6] The towage in this case certainly involved "peculiar hazards", and the case offers an ideal example of a situation where "the Federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances."[7]

The rationale of the rule of *Bisso* relative to discouragement of negligence by forcing wrong-doers to pay for their own tortious acts clearly is not applicable in this case. As a matter of fact, the clause under consideration here was not solely a release of liability: It contemplated that insurance on the JULIE ANN should inure to the benefit of Crescent, and Dixilyn affirmatively agreed to afford Crescent the benefit of its insurance. (The Court of Appeals found that the conclusion

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[5] *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp.*, 360 U.S. 411, 79 S. Ct. 1210.

[6] Opinion below, *supra*, footnote 1, p. 52.

[7] *Supra*, note 2.

that it intended to do so was inescapable.[5] The question therefore simply becomes one of whether Crescent's underwriters or Dixilyn's underwriters should pay the loss.

No "discouragement of negligence" is inherent in this type of arrangement, because under either circumstance the underwriters of the tug or the underwriters of the drilling rig would ultimately satisfy the damage claim. As is pointed out above, although *Bisso* set up the rule that an exculpatory clause in an ordinary towage contract *per se* is invalid, the decision did not go so far as to hold that a benefit of insurance clause would be invalid because the ultimate liability for damages was to be borne by the underwriters of the tow rather than the underwriters of the tug. Nor does *Bisso* reprobate the use of a benefit of insurance clause in a towage contract. Moreover, the value of the rig was so great that if Crescent had to insure the rig, it would have had to charge a very substantial amount for the towage movement, and when the negotiations for the confection of the towage contract were being carried on, the decision to have its own insurance cover any accidents was made by Dixilyn in order to save the amount which it would have been charged for the towage if Crescent were to be required to assume responsibility for damages to the tow or to third parties. The decision to do so was supported by a consideration: the offer of a lower rate for the service.

Since there was no monopoly involved in the area of free competition shown to have existed in the field of towage such as was involved here, and since there was no discouragement of negligence inherent in a shifting of responsibility from one set of underwriters to another, any reason for the rule of *Bisso* disappears; and even if

[5] Opinion below, *supra*, footnote 1, p. 50.

it were not to have disappeared, the subsequent rule of *Southwestern Sugar* to the effect that the Federal courts should fashion their own rules as to particularized circumstances where particularized hazards are involved, comes into full play and must be applied in the instant situation. This is exactly what the Court of Appeals for the Fifth Circuit has done, and since it has set forth this reasonable exception to the general rule pursuant to the directive of Your Honors, there should be no modification of its holding.

The second question presented by the application for certiorari is not, we submit, a matter which is within the scope of the review jurisdiction of this Court. No question of national importance whatever is raised, and the sole problem presented is whether or not the Court of Appeals for the Fifth Circuit should have interpreted the contract in one way or another.

As a matter of fact, this identical question was presented to Your Honors in connection with a prior decision of the Fifth Circuit, *Jacksonville Terminal Company v. Railway Express Agency, Inc.*,[9] where an application for certiorari was denied on April 23, 1962.[10]

In that case, which arose out of Florida, there was involved the interpretation of a contract providing for an indemnification agreement between the lessor and the lessee of a railway terminal property in Jacksonville. The question was presented as to whether or not it was necessary to use the "talismanic" word "negligence" in a hold harmless and indemnification agreement, where the indemnitee was seeking indemnification under a contract clause providing therefor but not specifically men-

[9] 296 F. 2d 256.
[10] 369 U.S. 860, 82 S. Ct. 949.

tioning that the "negligence" of the indemnitee was included. The Court of Appeals for the Fifth Circuit reviewed its prior jurisdiction and, aware that its conclusion was "inconsistent" with its prior holding in *Batson-Cook*,[11] nevertheless held that full force and effect was to be given to the indemnification agreement even though the circumstances involved negligence of the indemnitee and negligence as such was not specifically included in the hold harmless agreement.

Although we are not familiar with the reasons for the refusal to grant certiorari in *Jacksonville Terminal*, we presume that this Court simply felt that the question raised did not merit the attention of the Court because of its being purely local and a matter of contract interpretation. The same applies here. Moreover, Judge Tuttle's opinion in *Jacksonville Terminal*, quoted at length in the opinion below,[12] is, we submit, a complete answer to the contention of the petitioner herein. The fact is that the decision below in connection with the interpretation of the contract is unassailable and rests on firm grounds. There can be no doubt but that a fair reading of the contract here involved requires the holding that the parties intended there to be a release of all liability, whether caused by negligence or otherwise. The District Court held to the contrary, but it did so prior to the decision of the Court of Appeals in *Jacksonville Terminal*,[13] the latest expression of the Court prior to its decision

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[11] *Batson-Cook Company v. Industrial Steel Erectors*, 257 F. 2d 410, where the court held:

> "Since the contract confessedly does not contain the talismanic words 'even though caused, occasioned or contributed to by the negligence, sole or concurrent' of the Indemnitee, or like expressions, the Indemnitee seeks to find the equivalent clear intent in other language of the agreement."

[12] Opinion below, *supra*, footnote 1, pp. 47-48.

[13] The District Court entered its decision in this case on December 5, 1960; the opinion in *Jacksonville Terminal* was announced by the Fifth Circuit on November 17, 1961.

herein, and in the mistaken belief that it was following the correct rule of interpretation of the Court of Appeals.

CONCLUSION

We respectfully submit that there is no ground for the granting of a writ of certiorari on the contract interpretation question, and there is no merit in the petition for a review of the judgment of the Court of Appeals insofar as the towage rule announced by that Court in this case is concerned. Accordingly, we respectfully urge that the application for certiorari be denied.

Respectfully submitted,

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